Public Prosecutor v Roslan bin Imun

HIGH COURT OF MALAYA (JOHOR BAHRU) — CRIMINAL REVISION NO 43-3 OF 1999
ABDUL MALIK ISHAK J
17 JULY 1999

Criminal Procedure *— Revision — Scope of power of — Whether revisionary court entitled to go into questions of fact — Revisionary power, when exercised — Newspaper reports — Whether High Court entitled to call for revision on perusal of newspaper reports*

Criminal Procedure *— Sentence — Whipping — Circumstances for imposition — Effectiveness — Violence — Plea of guilty — Accused pleaded guilty to grave and violent crime — Callous behaviour of accused after commission of crime — Whether accused to be given discount in sentence for pleading guilty — Whether graveness of crime outweighed mitigating factors*

Criminal Procedure *— Sentence — General principles of sentencing — Deterrence*

The accused, who had just been released from prison after serving a 20 year jail sentence for an offence under s 304 of the Penal Code ('the Code'), was charged in the sessions under s 326 of the Code for forcefully pushing a 60cm stick up the anus of a 12 year old schoolboy. The crime was committed with such violence that the stick went right up to the surface of the schoolboy's chest, puncturing his bladder, rupturing his intestines and causing other severe internal injuries. The accused pleaded guilty as charged and upon conviction was sentenced by the learned sessions court judge to the maximum 20 years' imprisonment as provided for under s 326 of the Code. However, the accused was not sentenced to whipping. The accused appealed against sentence and the prosecution appealed against the failure of the sessions court judge to impose whipping. Before the appeal came up for hearing, the learned High Court judge, his attention having been drawn to newspaper reports of the heinous crime, exercised his revisionary powers under s 323 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') and called for the record of proceedings. At the hearing of the revision, the accused was given the opportunity of being heard and implored the court to confirm the 20 years' imprisonment and to further impose an additional sentence of 20 strokes of the rattan in order to 'appease his sins'.

Held, confirming the sentence of 20 years' imprisonment but additionally ordering that the accused be whipped with 20 strokes of the rattan:

(1) In special and exceptional circumstances, a revisionary court is entitled to go into questions of fact and do justice though this power must be sparingly exercised. The revisionary court usually accepts the findings on questions of fact recorded by a subordinate court unless the finding is manifestly perverse or patently erroneous. The power of interference is to be exercised sparingly and only when there appears to have been a miscarriage

of justice or a perverse and unreasonable decision or sentence. The revisionary power of the court can also be exercised when the trial court perfunctorily appreciated the evidence adduced before it or where the trial court had acted capriciously or where it made a finding based on inadmissible evidence (see p 669D–G).

(2) This was a case of public importance and the High Court was entitled to react on perusal of the newspaper reports. The crime was committed deliberately and with such violence that the High Court had an onerous duty to revise the order of the sessions court to suit the facts of the case (see pp 669C, 664I).

(3) The sentence of whipping should be imposed in such a way so as to be effective and should be imposed only when there is evidence of a substantial degree of actual physical violence. On the facts, the crime that the accused was guilty of was cruelty at its height and deserved the sentence of whipping in addition to the sentence of 20 years' imprisonment. Such a sentence would deter the accused and others from committing the same offence in the future (see pp 667C, 666I–667A).

(4) The callousness of the accused, his behaviour after the commission of the offence and the fact that the schoolboy had just been circumcised were all important factors to be considered in imposing sentence. Although the accused had pleaded guilty, this was not a case where the court should give a discount to the accused for pleading guilty. The high degree of physical violence resorted to by the accused and the pressing need to protect the nation's young citizens had to override everything else. There was no redeeming feature in favour of the accused for the court to consider. The crime in the instant case was so grave that it outweighed the mitigating factors advanced by the accused before the sessions court judge (see pp 668E– 669B, 672A).

(5) The presence of aggravating features in a case are likely to influence the court in imposing a deterrent sentence. Deterrence is functional as a technique of crime control and prevention and a deterrent punishment is justified as a method of inculcating respect for law and order (see pp 670E, 671C–E).

[Bahasa Malaysia summary

Tertuduh, yang baru dibebaskan daripada penjara selepas menjalani hukuman penjara 20 tahun atas kesalahan di bawah s 304 Kanun Keseksaan ('Kanun tersebut'), telah dituduh di dalam mahkamah sesyen di bawah s 326 Kanun tersebut kerana telah menolak secara kuat sebatang kayu berukuran 60sm ke dalam dubur seorang budak sekolah lelaki. Jenayah ini telah dilakukan dengan ganas sehinggakan kayu tersebut terus menusuk ke permukaan dada budak sekolah lelaki itu, menyebabkan pundi beliau bocor, usus-usus beliau pecah dan kecederaan dalaman serius yang lain. Tertuduh telah mengaku salah terhadap tuduhan dan pada sabitan telah dihukum oleh hakim mahkamah sesyen yang bijaksana sehingga maksimum 20 tahun

penjara sepertimana yang diperuntukkan di bawah s 326 Kanun tersebut. Walau bagaimanapun, tertuduh tidak dihukum sebat. Tertuduh telah membuat rayuan terhadap hukuman tersebut dan pihak pendakwaan telah membuat rayuan terhadap kegagalan hakim mahkamah sesyen mengenakan sebatan. Sebelum rayuan didengari untuk perbicaraan, hakim Mahkamah Tinggi yang bijaksana — perhatian beliau telah ditarik oleh laporan-laporan suratkhabar tentang jenayah yang amat kejam ini — telah menggunakan kuasa penyemakan beliau di bawah s 323 Kanun Acara Jenayah (FMS Bab 6) ('KAJ') dan memanggil laporan prosiding-prosiding. Pada perbicaraan penyemakan tersebut, tertuduh telah diberi peluang untuk didengari dan merayu kepada mahkamah untuk mengesahkan hukuman penjara 20 tahun tersebut dan untuk seterusnya mengenakan hukuman tambahan 20 kali sebatan rotan sebagai 'menghapuskan dosa-dosa beliau'.

Diputuskan, mengesahkan hukuman 20 tahun penjara tetapi dengan tambahan memerintahkan tertuduh disebat sebanyak 20 kali sebatan rotan:

(1) Di dalam keadaan-keadaan istimewa dan luar biasa, mahkamah penyemakan berhak menjurus kepada pertanyaan-pertanyaan fakta dan menjalankan keadilan walaupun kuasa beliau mesti digunakan dengan berhati-hati. Mahkamah penyemakan biasanya menerima penemuan-penemuan pada pertanyaan-pertanyaan fakta yang direkodkan oleh mahkamah rendah kecuali penemuan tersebut adalah dengan nyata berlawanan dan jelas salah. Kuasa untuk campur tangan hendaklah digunakan dengan berhati-hati dan hanya jika berlaku kesilapan mahkamah atau keputusan atau hukuman yang nyata dan tidak munasabah. Kuasa penyemakan mahkamah boleh juga digunakan apabila mahkamah perbicaraan sambil lewa menyedari keterangan yang dikemukakan di hadapannya atau di mana mahkamah perbicaraan telah bertindak tidak menentu atau di mana ia telah membuat suatu penemuan berdasarkan keterangan yang tidak boleh diterima (lihat ms 669D–G).

(2) Ini merupakan suatu kes kepentingan awam dan Mahkamah Tinggi berhak untuk bertindak dengan penuh teliti terhadap laporan-laporan suratkhabar itu. Jenayah tersebut telah dilakukan dengan sengaja dan penuh kekejaman sehingga Mahkamah Tinggi mempunyai suatu tugas yang berat untuk menyemak perintah mahkamah sesyen tersebut supaya bersesuaian dengan fakta kes (lihat ms 669C, 664I).

(3) Hukuman sebat hendaklah dikenakan sedemikian supaya berkesan dan hendaklah dikenakan hanya apabila keterangan menunjukkan wujud kekejaman fisikal yang nyata pada darjah yang cukup besar. Di atas fakta-fakta ini, jenayah di mana tertuduh didapati bersalah adalah kekejaman yang amat tinggi dan patut menerima hukuman sebat itu sebagai tambahan kepada hukuman penjara 20 tahun. Hukuman seperti ini akan meng-

halang kesalahan yang sama dilakukan pada masa hadapan (lihat ms 667C, 666I–667A).

(4) Sifat tidak berperasaan tertuduh, kelakuan beliau selepas melakukan kesalahan itu dan hakikat budak sekolah lelaki itu baru sahaja bersunat merupakan faktor-faktor penting yang perlu diambil kira di dalam megenakan hukuman. Walaupun tertuduh telah mengaku salah, ini bukan suatu kes di mana mahkamah patut mengambil kira pengakuan bersalah tertuduh. Kekejaman fizikal pada darjah yang cukup besar yang dilakukan oleh tertuduh dan keperluan mendesak untuk melindungi rakyat muda negara harus mengatasi segalanya. Tidak terdapat ciri baik tertuduh yang berpihak kepada beliau untuk diambilkira oleh mahkamah. Jenayah di dalam kes ini amat serius sehingga ia jauh lebih penting daripada faktor-faktor mitigasi yang telah dikemukalan oleh tertuduh di hadapan hakim mahkamah sesyen (lihat ms 668E–669B, 672A).

(5) Kewujudan ciri-ciri yang memburukkan lagi di dalam suatu kes berkemungkinan mempengaruhi mahkamah mengenakan hukuman pencegahan. Pencegahan berfungsi sebagai suatu teknik mengawal jenayah dan pencegahan hukuman adalah dijustifikasikan sebagai suatu kaedah menanam perasaan hormat kepada undang-undang dan perintah (lihat ms 670E, 671C–E).]

Notes

For cases on revision generally, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2124–2160.

For cases on sentence generally, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2213–2674.

Cases referred to

Anadi Sahu v Surendra Naik [1969] Cr LJ 499, AIR 1969 Orissa 70 (refd)

Chai Ah Kau v PP [1974] 2 MLJ 191 (refd)

Chaurasi Manjhi [1970] Cri LJ 1235 (Pat) (refd)

Chandmal v State [1971] Cr LJ 137 (Raj) (refd)

Chandrika Prasad v Mohammad Jafar 41 Cr LJ 891, AIR 1941 Oudh 7 (refd)

Digendra Kumar v Tarini Charan [1970] Cr LJ 1212 (Tripura) (refd)

Emperor v Lachiram ILR 28 Bom 533 (refd)

Ismail Umar (1938) 40 Bom LR 832; 39 Cr LJ 928, AIR 1938 Bom 430 (refd)

Ja'afar & Ors v PP [1961] MLJ 186 (refd)

Jagir Kaur v Jaswant Singh [1963] 2 Cr LJ 413, AIR 1963 SC 1521 (refd)

Jamil Hasan [1974] Cri LJ 867 (All) (refd)

Kechan Velayudhan v State of Kerala [1961] 1 Cr LJ 70, AIR 1961 Ker 8 (refd)

Koh Seng Wah v PP[1966] 1 MLJ 12 (refd)

Lim Thian Hen & Ors v Regina; Tan Beng Seng v Regina; Chua Ah Seng v Regina [1953] MLJ 213 (refd)
Low Oi Lin v Rex [1949] MLJ 210 (refd)
Mathura Prasad v Mulli [1966] Jab LJ 449 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)
Mohamed Ali v Public Prosecutor [1956] MLJ 84 (refd)
Mohamed Noor v PP [1966] 2 MLJ 173 (refd)
Nadir Khan v State [1975] Cr LR (SC) 434, [1975] 2 SCC 406; [1975] Cr AR (SC) 231 (refd)
Narayan Tewari v State of West Bengal AIR 1954 SC 726, [1954] Cr LJ 1808 (refd)
Ngangon Tomba v Sri Maibam AIR 1970 Manipur 79 (refd)
PP v Doraigunaraju all Krishnan [1993] 3 CLJ 664 (refd)
PP v Man bin Ismail [1939] 8 MLJ (FMSR) 207 (refd)
PP v Teh Ah Cheng [1976] 2 MLJ 186 (refd)
PP v Yeoh Eng Khuan [1976] 1 MLJ 238 (refd)
Prem Chand v State [1960] Cr LJ 317 (refd)
Prem Kumar v State [1967] Raj LW 217 (refd)
R v Ball (1951) 33 Cr App R 164 (refd)
Raja Izzuddin Shah v PP [1979] 1 MLJ 270 (refd)
Reg v JH Sargeant (1975) 60 Cr App R 74 (refd)
Ram Chandra v State [1969] Cr LJ 112, 113, AIR 1969 Bom 20 (refd)
Smt Hansabai v Balkrishna [1981] Cr LJ 110 (Kant) (refd)
Soo Leot, Re[1956] MLJ 54 (refd)
Sulamut Russooa [1865] 4 WR (Cr) 17 (refd)
Tay Choo Wah v PP [1976] 2 MLJ 95 (refd)
Vennel & Ors v PP [1985] 1 MLJ 459 (refd)
Wong Siew v PP [1933] 1 MC 154 (refd)
Yong Pak Yong v PP [1959] MLJ 176 (refd)

Legislation referred to

Criminal Procedure Code ss 288(i), (iii), (v), 289(c), 290(i), (ii), 291(i), (ii), 293, 294, 323(i), 325(ii)
Dangerous Drugs Ordinance 1952 s 39A
Penal Code s 326

Teo Say Eng (*Ishak bin Mohd Yusof* with him) (Deputy Public Prosecutors) for the prosecution.

Accused in person.

Abdul Malik Ishak J: The *New Straits Times* dated 14 July 1999 carried a front page report and the photograph of the accused with the caption:

> Grass cutter jailed 20 years for causing grievous hurt to school boy.

The *Star* too in its edition dated 14 July 1999 carried the report and the photograph of the accused with an eye catching caption, in its front page

> Monster jailed.

The popular Malay daily, *Utusan Malaysia*, in its front page report dated 14 July 1999 carried the photograph of the accused with the caption:

> Bekas banduan sula murid dipenjara 20 tahun. (An ex-convict who impaled student jailed 20 years).

Public interests must have been visibly stirred by these eye catching phrases and the stories that unfolded thereto. The learned sessions court judge Madam Siti Mariah bte Hj Ahmad in her wisdom imposed the maximum 20 years' imprisonment on the accused for an offence under s 326 of the Penal Code. That section is worded thus:

> Whoever, except in the case provided by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine or to whipping.

In exercising my revisionary powers under s 323(i) of the Criminal Procedure Code (FMS Cap 6) ('CPC'), I called for the record of proceedings for the purpose of satisfying myself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the sessions court in question. In *Re Soo Leot* [1956] MLJ 54, Buhagiar J dutifully followed the principles laid down by Jenkins CJ in *Emperor v Lachiram* ILR 28 Bom 533, and his Lordship succinctly said that:

> ...: the powers of the High Court in revision are exercisable at the discretion of the court and that discretion is untrammelled and free, so as to be fairly exercised according to the exigencies of each case.

Was the revision necessary? This was a case where the accused, a grass cutter and an ex-convict, who was just released from prison on 16 February 1999 after serving a 20 year jail sentence for raping a minor who subsequently died in 1985 and for that he was charged under s 304 of the Penal Code before the High Court in Muar on 16 October 1985, had the audacity to commit a heinous crime on 1 June 1 1999 by violently shoving a 60 cm stick up the anus of his victim, a young innocent schoolboy. The reporters had a field day and without them I would not know of the seriousness of the offence and there would not be a need to revise this case.

The innocent schoolboy, aged 12, survived the ordeal. Clearly, the accused is a devil with a human mask. Without a doubt, the accused had committed a heinous and inhuman offence causing inexplicable pain and trauma to that schoolboy. The medical report makes for an interesting reading. It took the doctors 5.5 hours to surgically remove the stick from the boy's anus. Society has to be protected from monsters like the accused. This court has a duty, nay an onerous one, to revise the order of the sessions court to suit the facts of the case. The offence was committed on 1 June 1999 at about 5pm to 6pm along Jln Tun Ibrahim, Bandar Tenggara, Kota Tinggi and it was the swift action of the police that resulted in the arrest of the accused on the same day in his house in Bandar Tenggara. On that

fateful day, the accused had stopped that schoolboy who was riding his bicycle alone on the pretext of asking for help. At that time, the accused was carrying a sack of durians and he had asked the schoolboy for assistance to transport the durian fruits on the bicycle ridden by the schoolboy to a nearby bush. The school boy willingly obliged not knowing what was in store for him. On arrival at the designated place, the accused repeatedly punched the schoolboy until he fell unconscious. Having successfully overpowered the young school boy, the accused then used a 60 cm stick with its leaves and branches protruding and forcefully shoved it into the school boy's anus. That must have been very painful. When the schoolboy recovered consciousness, he could not move and he experienced sharp pain and profuse bleeding in his anus. At that time, the accused was no longer in sight. The boy's father Abdul Razak Rahmat had gone out to look for his son when his son did not return home by 6.30pm. That frantic search proved fruitful. Abdul Razak Rahmat managed to trace his son who was at that time lying on the ground with his pants pulled down and the stick was seen protruding from his son's anus with blood oozing out profusely. The medical report showed that 5 cm of the stick was seen protruding out from the schoolboy's anus with minimal bleeding, which by then had dried. The other end of the stick went right up to the surface of the chest skin puncturing the school boy's urinal bladder and rupturing his small and large intestines with severe tears in the anus. Medically speaking there was an anterior anal tear about 1 cm with a perforated urinary bladder at both its anterior and posterior walls. Ileal serosal tears with haematoma at the middle $^1/_3$ were detected at two places. There was a greater omentum tear with diaphragmatic perforation at the anterior attachment. Multiple abrasions on the school boy's chest was also detected. Part of the stick under the sternal skin from the xiphisternum to below the suprasternal notch measured 15 cm long. The doctors too found two twigs in the bladder with a few leaves in the peritoneal cavity. The surgical operation on the school boy was conducted successfully and the operation was focussed on:

> Exploratory laparotomy with repair of the anal tear and urinary bladder; with repair of the ileal serosa, appendicectomy, diaphragmatic tear repair with proximal sigmoid loop colostomy and suprapubic cystostomy.

After the operation, the school boy was kept in the ICU ward for two days for management purposes. On the third day of the schoolboy's stay in the hospital, he was transferred to the general ward. It was said that post operatively the schoolboy's recovery was uneventful. Psychiatric follow up was accorded to the schoolboy. On 26 June 1999, the schoolboy was discharged from hospital and his follow up was scheduled on 8 July 1999. Distal looporgram was conducted on the schoolboy on 12 July 1999.

In my judgment, shoving a stick of that length forcefully into the anus of the schoolboy with the other end located at the surface of the chest skin was done deliberately and it constituted violence of the highest degree. As an instrument within the meaning of s 326 of the Penal Code, the stick shoved into the anus of that schoolboy in that fashion was likely to cause death. It was an unimaginable act, a behaviour of the dastardly. Indeed the accused found it fashionable to do so. In his cautioned statement, the

accused admitted to that dastardly act on the innocent schoolboy. Surprisingly, in his cautioned statement too the accused proclaimed to the whole world at large that he did the same thing to another young boy in Kulai at the Shell petrol station in April 1999 and that boy had since died. Both the deputy public prosecutors in the persons of Mr Teo Say Eng and Mr Ishak Mohd Yusof jumped up to the occasion and in open court showed me the investigation papers of the Kulai episode with photographs of the deceased boy. The accused on being shown the photographs of the Kulai episode in the investigation papers unabashedly admitted to being responsible for that heinous crime also. Both the deputy public prosecutors submitted that the accused was not charged for that Kulai episode and that was the end of the matter as the powers of the prosecution are beyond the realms of the courts.

As stated earlier s 326 of the Penal Code carries a sentence of 20 years' jail, a fine or whipping. Section 288(i) of the CPC gives this court the power to order whipping not exceeding 24 strokes in the case of an adult recalcitrant like the accused. Section 325(ii) of the CPC enacts that no order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence. Having accorded the accused the right to address the court, the accused said that he deserved to be given the rotan in addition to the 20 years' jail sentence imposed by the sessions court. In repenting, the unrepresented accused said: 'Hopefully, Allah will forgive me for my sins.' The accused further said as follows:

> I understand that I must be punished severely for committing such a heinous act. I am remorseful and deeply regret my actions. I agree that the sentence passed by the sessions court was inadequate. Therefore, I want the court to order that I be whipped 20 times so that I can cleanse my sins.

In my years of service, I have yet to come across a case of this nature.

In India, the quantum of punishment for cutting off a wife's nose for intriguing with another man depends on the time of the commission of the grievous hurt, whether committed instantly or long after the husband had found himself dishonoured (*Sulamut Russooa* [1865] 4 WR (Cr) 17). The case of *Jamil Hasan* [1974] Cri LJ 867 (All) which followed the case of *Chaurasi Manjhi* [1970] Cri LJ 1235 (Pat) was quite unique.

There the accused had bit off the tip of his wife's nose with his teeth, and the High Court confirmed the conviction and sentence of rigorous imprisonment for a period of one year. In India, there were many cases of nose cutting and these cases showed deliberate designs of brutality and adequate punishments were meted out accordingly (*Ismail Umar* (1938) 40 Bom LR 832; 39 Cr LJ 928; AIR 1938 Bom 430). I hope there would not be any cases of nose cutting in Malaysia. The accused here is an exception to the general rule. Pushing a stick forcefully measuring 60 cm long into the anus of the schoolboy that went right in towards the chest level must surely be documented as the first case of its kind in Malaysia. It was cruelty at its height; beyond words or description. The pain, agony, trauma that the schoolboy went through cannot be put into words. Whipping, as an additional sentence to that of 20 years' imprisonment, must surely be the

A best anecdote for the accused. It would definitely deter the accused and others of his ilk who are bent on committing the same offence in the near future.

The lawbooks are replete with authorities on whipping. I will now cite a few of them. Adams J in *Ja'afar & Ors v PP* [1961] MLJ 186 laid down a B principle that is worth repeating. There his Lordship said that if whipping were to be imposed it should be effective and that to award three strokes were said to be useless. The Court of Criminal Appeal of Singapore comprising of Murray-Aynsley CJ, Brown and Buttrose JJ in *Lim Thian Hen & Ors v Regina*; *Tan Beng Seng v Regina*; *Chua Ah Seng v Regina* [1953] MLJ 213 aptly said that the sentence of whipping should be imposed only C when there was evidence of a substantial degree of actual physical violence. Buhagiar J in *Mohamed Ali v Public Prosecutor* [1956] MLJ 84 echoed the same sentiments. In *Yong Pak Yong v PP* [1959] MLJ 176, Good J emphasised that in cases where no violence was actually used, or brutality actually shown, but where violence and brutality were undoubtedly involved such as secret society extortion demands, the thug who has not had D occasion to implement his threat of violence deserved corporal punishment in the form of whipping just as much as if he had inflicted it.

It is interesting to note that s 288(v) of the CPC enacts that when a person is convicted at one trial of any two or more distinct offences any two or more of which are legally punishable by whipping, the combined E sentences of whipping awarded by the Court for any such offence shall not, anything in any written law to the contrary notwithstanding, exceed a total number of twenty-four strokes in the case of adults and ten strokes in the case of youthful offenders. The crucial words 'at one trial' appearing in s 288(v) of the CPC gave rise to some problems initially but fortunately it was clarified by the Singapore case of *Chai Ah Kau v PP* [1974] 2 MLJ 191. F In that case, the accused was charged for armed robbery in one court in the morning and that court sentenced him to 18 months' imprisonment and 10 strokes of the rattan. On the same day, he was produced in the same court for another offence of armed robbery and this time the court sentenced the accused to 3 years' imprisonment and 10 strokes of the G rattan. The Singapore Court of Appeal held that since the offender was an adult and since there were two separate trials, the total of 20 strokes was well within the maximum of 48 strokes. I might as well point out that under s 289 of the CPC, there are three categories of persons who cannot be whipped:

H (a) females;

(b) males sentenced to death;

(c) males whom the court considers to be more than 50 years of age.

Paragraph (c) of s 289 of the CPC is widely worded so as to provide for I cases where the offenders could not produce identification documents to verify their ages. In such an eventuality, the practice has been to refer the offender to the medical officer who would be required to examine the offender and submit a medical report thereto.

Whipping must be carried out in one go, it cannot be executed on instalment basis. Under s 290(i) of the CPC, the punishment of whipping shall not be inflicted unless a Medical Officer is present and certifies that the offender is in a fit state of health to undergo such punishment. Section 290(ii) of the CPC further enacts that if, during the execution of a sentence of whipping, a Medical Officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence the whipping shall be finally stopped. But in the case of a youthful offender (s 290(iii) of the CPC), a Medical Officer need not be present at the time of the execution of whipping when the whipping is inflicted under s 293 of the CPC, however the whipping shall not be inflicted unless it appears to the court that the offender is in a fit state of health to undergo the ordeal. Section 291(i) of the CPC enacts that in the event a sentence of whipping is wholly or partially prevented from being executed the offender shall be kept in custody till the Court which passed the sentence can revise it, and the said Court may in its discretion either remit such sentence or sentence the offender in lieu of whipping or in lieu of so much of the sentence of whipping as was not executed to imprisonment for a term which may extend to 12 months, which may be in addition to any other punishment to which he has been sentenced for the same offence. The court must always act within the law. Section 291(ii) of the CPC enacts that the court is not authorised to inflict imprisonment for a term exceeding that to which the accused is liable by law or which the said court is competent to inflict.

Reverting back to the factual matrix of the case, the callousness on the part of the accused can readily be seen when he left the schoolboy at the scene to die. That would be the obvious result if not for the timely arrival of the boy's father. The police investigations were quite thorough. It seemed that soon after committing the offence, the accused had gone to a road side stall and ordered iced tea. There were blood stains on the accused hands and when the stall owner enquired, the accused angrily retorted that he had just slaughtered a chicken. The behaviour of the accused after the commission of the offence must certainly be considered by this court. In *Raja Izzuddin Shah v PP* [1979] 1 MLJ 270, the fact that the offender there had repented was given due weight and was considered by the appellate judge. So was a show of remorse in *Vennel & Ors v PP* [1985] 1 MLJ 459 at p 460 that was demonstrated after the offence was committed was also considered to be pertinent and relevant.

Another important factor to note would be this. The schoolboy had just undergone circumcision and the medical report reads as follows:

> Penis healing, circumcised penis.

Just imagine, a young schoolboy who had just been circumcised was subjected to abuse of his anus with a 60 cm long stick that was shoved forcibly up to his chest level. The pain must be unimaginable. Unbearable. The despicable act of the accused cannot be condoned by this court. Young citizens must be protected from the likes of people like the accused. The imposition of the sentence of whipping on the accused in addition to the custodial sentence would serve as a painful reminder to the accused that crime does not pay. This was not the case where this court should give a

A discount to the accused just because he had pleaded guilty before the learned sessions court judge. The discount in sentencing of between one-quarter to one-third as propounded by the Supreme Court in *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167 cannot be vigorously applied to the accused as a matter of right. The crime committed by the accused – its high degree of physical violence and the pressing need to B protect the nation's young citizens must certainly override everything else. There was no redeeming feature in favour of the accused for this court to consider. I did say in *PP v Doraigunaraju all Krishnan* [1993] 3 CLJ 664 at p 666 that:

> ... The court must be sensitive and must endeavour to impose the right C sentence for the criminality of the accused.

Certainly, this was a case of public importance and this court is entitled to react on perusal of the newspaper reports (*Nadir Khan v State* [1975] Cr LR (SC) 434; [1975] 2 SCC 406; [1975] Cr AR (SC) 231). This case was prominently featured in the local newspapers and this court would fail in its D duty if the sentence was not revised to reflect the gravity and magnitude of the offence. It has been said, since time immemorial , that in special and exceptional circumstances, the revisional court is entitled to go into the question of fact and do justice, but this power must be sparingly exercised (*Kechan Velayudhan v State of Kerala* [1961] 1 Cr LJ 70 (75), AIR 1961 Ker 8; *Jagir Kaur v Jaswant Singh* [1963] 2 Cr LJ 413 at p 417, AIR 1963 E SC 1521; *Narayan Tewari v State of West Bengal* AIR 1954 SC 726 at p 728, [1954] Cr LJ 1808; *Ram Chandra v State* [1969] Cr LJ 112 at p 113, AIR 1969 Bom 20; *Anadi Sahu v Surendra Naik* [1969] Cr LJ 499 at p 500, AIR 1969 Orissa 70; *Digendra Kumar v Tarini Charan* [1970] Cr LJ 1212 (Tripura); *Ngangon Tomba v Sri Maibam* AIR 1970 Manipur 79; and *Chandmal v State* [1971] Cr LJ 137 (Raj)). The revisionary court usually F accepts the findings on questions of facts recorded by a subordinate court unless the finding is manifestly perverse or patently erroneous (*Prem Chand v State* [1960] Cr LJ 317 at p 318; *Prem Kumar v State* [1967] Raj LW 217; and *Mathura Prasad v Mulli* [1966] Jab LJ 449). I venture to say that the power of interference is to be exercised sparingly and only when there appears to have been a miscarriage of justice or a perverse and unreasonable G decision or sentence (*Chandrika Prasad v Mohammad Jafar* 41 Cr LJ 891 at p 893, AIR 1941 Oudh 7). The revisionary power of the court too can be exercised when the trial court perfunctorily appreciated the grain of the evidence adduced before it or the trial court had acted capriciously or the trial court made a finding which was based on inadmissible evidence (*Smt Hansabai v Balkrishna* [1981] Cr LJ 110 (Kant)). H

It is to do justice that this case was revised to add the additional punishment of whipping; and the word 'whipping' in the Penal Code does not include whipping with a cat-o'-nine tails (*Wong Siew v PP* [1933] 1 MC 154) but rather the rattan used for whipping shall be not more than half an inch in diameter (s 288(iii) of the CPC).

I Taylor J in *Low Oi Lin v Rex* [1949] MLJ 210, at p 211 once said that: 'It is impossible to lay down rules for fixing sentences'. But to me the considerations that should influence the sentencers, the principles and

guidelines the sentencers should follow, the factors that the sentencers should take into account, have been well documented and indicated by the appellate decisions. Indeed Taylor J in the same case proceeded to say at p 211 of the report:

> There are certain factors such as prevalence, difficulty of detection and injury to the public revenue which operate in the direction of severity and others such as leniency to first offenders which operate in the other direction and where, as frequently happens, a number of these factors apply in one, case the court must balance them as best as it can.

Perhaps the best guide can be found in the judgment of Hilbery J in the English case of *R v Ball* (1951) 33 Cr App R 164 at p 165 where his Lordship said:

> In deciding the appropriate sentence, a court should always be guided by certain considerations; the first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it.

Sentencing is acknowledged to be a difficult task with each case calling for and requiring individual consideration. Lawton J recognised the 'classical principles of sentencing' in *Reg v JH Sargeant* (1975) 60 Cr App R 74 and at p 77 his Lordship summed up the principles in four words: retribution, deterrence, prevention and rehabilitation. The late Abdoolcader J (who retired as SCJ) in *PP v Teh Ah Cheng* [1976] 2 MLJ 186 at p 187 favourably spoke of Lawton J's 'delightful analysis of the classic principles of sentencing and general aspects of punishment ... .' in *Reg v JH Sargeant.* The presence of aggravating features are likely to influence the court to put uppermost in its mind the demands of deterrence. The present revision was such a case and was not an exception. Aggravating features would take the following forms: that the offence was pre-meditated and well executed, that the offender has previous convictions, that the offence is of a type that is difficult to detect, that the public feels especially afraid of the type of offence, that the offender abused a position of trust and that others may need to be deterred from committing such an offence. I must say that if any of such features are present — the list does not purport to be exhaustive, then the offender can expect to be dealt with sternly. Examples of aggravating features can be seen in *Koh Seng Wah v PP*[1966] 1 MLJ 12 of 'cool and calculated' frauds; in *Mohamed Noor v PP* [1966] 2 MLJ 173 where the offence was prevalent and the accused had a previous similar conviction; and in *Tay Choo Wah v PP* [1976] 2 MLJ 95 where there was an abuse of a position of trust.

That visionary judge, the late Abdoolcader J (who retired as SCJ), saw the dangers of handing out lenient sentences to persons convicted of serious offences. Since deterrence and prevention assume positions in the forefront for sentencing, his Lordship the late Abdoolcader J (who retired as SCJ) in relation to an appeal which involved an 18 year old male found in possession of a pistol and six rounds of ammunition where the Sessions Court at Ipoh bound the offender over for two years remarked that to deal with those offenders by way of binding them over would 'be about as useful and

effective as clouting a cobra with a clothes-peg' (*PP v Teh Ah Cheng* [1976] 2 MLJ 186 at p 188). The cobra in the present revision would undoubtedly be the accused and he needed to be 'clouted' with whipping of 20 strokes of the cane.

The author by the name of Franklin Zimring in an article entitled 'From Perspectives on Deterrence' NIMH Monograph Series, January 1971, Part II, Deterrent Motives and Crime Control Policies, at p 11 remarked:

> ... (t)here seems to be a tendency for people, ... to think in a straight line about the deterrent effect of sanctions. If penalties have a deterrent effect in one situation, they will have a deterrent effect in all; if some people are deterred by threats, then all will respond; if doubling a penalty produce an extra measure of deterrence, trebling the penalty will do still better.

To me, deterrence is functional as a technique of crime control and prevention. Professor Packer once said (Packer at *Limits of Criminal Sanction* at p 149 (Stanford University Press, 1968)) that: 'people who commit crimes appear to share the prevalent impression that punishment is an unpleasantness that is best avoided.' Indeed to threaten an offender with punishment is to some extent a very promising strategy of influencing behaviour. Mere threat is not enough. To make the threat of punishment a reality, the courts must punish severely those offenders that are caught and charged. A large and diverse vocabulary has developed on the motives for punishment. To me a deterrent punishment is justified as a means of expressing society's retributive feelings as a method of inculcating respect for law and order. The only effective way to suppress crime, in the circumstances of the present revision, would be to impose a severe penalty. In order to ensure the curative effects of a threat, the courts must make the threat unpleasant and that is another way of saying that the sentence will have to be severe and harsh.

Lest I be accused of an oversight, I must now revert to the punishment as prescribed in s 326 of the Penal Code. It reads:

> ... shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine or to whipping.

and the words 'shall be punished' require the court to impose a mandatory term of imprisonment, be it for one day. While Aitken J in *PP v Man bin Ismail* [1939] 8 MLJ (FMSR) 207 remarked that the words 'shall be liable to' gave the court an absolute discretion as to whether it shall award a sentence of imprisonment or dispose of the case under s 294 of the CPC. In *PP v Yeoh Eng Khuan* [1976] 1 MLJ 238, Abdoolcader J (who later rose to be SCJ) had occasion to deal with s 39A of the Dangerous Drugs Ordinance, 1952 which enacted that the accused 'shall be liable to imprisonment for a term not exceeding fourteen years and not less than three years', and his Lordship substituted the binding over under s 294 of the CPC with three years' imprisonment as his Lordship felt that the three years' imprisonment was a minimum mandatory term.

This was a crime that was committed in a callous and calculated manner. It was orchestrated in late evening in a lonely road where there

were no eye witnesses. Fortunately, the schoolboy survived to tell his harrowing tale. There was absolutely no reason for the accused to have done what he had done. It was despicable and unforgiveable. It was so grave that it outweighs the mitigating factors which have been advanced by the accused before the learned sessions court judge.

For the reasons adumbrated above, I unhesitantly revised the sentence imposed by the learned sessions court judge. I ruled and it was my judgment that the sentence of 20 years' imprisonment to run with effect from the date of arrest of the accused on 1 June 1999 as imposed by the learned sessions court judge be and are hereby confirmed. In addition to that, I too ordered that the accused be whipped with 20 strokes of the rattan following the provisions of the CPC. All the exhibits to be returned to the police through the learned deputy public prosecutors while the documentary exhibits to remain with this court forthwith.

Addendum

After I had revised the case and passed sentence accordingly, the learned deputy public prosecutors informed me that the accused had filed an appeal against excessive sentence imposed by the learned sessions court judge. Not only that, the prosecution too had filed a notice of appeal in regard to the inadequate sentence imposed by the learned sessions court judge — in obvious reference to the failure of the learned sessions court judge to impose whipping. These appeals have now become academic for the following reasons:

(1) the accused himself craved to this court to confirm the 20 years' imprisonment with effect from 1 June 1999 as imposed by the learned sessions court judge and begged this court to impose an additional sentence of 20 strokes of the rattan in order to appease his sins;

(2) the accused himself told this court and undertook to withdraw his appeal lodged in regard to the purported excessive sentence imposed by the learned sessions court judge; and

(3) the learned deputy public prosecutors too undertook to withdraw their appeal in regard to the inadequate sentence imposed by the learned sessions court judge as they have achieved their desired goals through this revision, an exercise of discretion by this court to safeguard public interests.

Sentence confirmed with 20 strokes whipping.

Reported by Andrew Christopher Simon

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